

(2)  
No. 91-616

Supreme Court, U.S.  
FILED

NOV 12 1991

OFFICE OF THE CLERK

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IN THE  
SUPREME COURT  
OF THE UNITED STATES

October Term, 1991

STANLEY DILLER,

Petitioner,

vs.

SELVIN & WEINER and  
ROBINSON, ROBINSON &  
PHILLIPS, INC. and  
DOROTHY DILLER,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE  
SECOND APPELLATE DISTRICT COURT OF APPEAL  
OF THE STATE OF CALIFORNIA

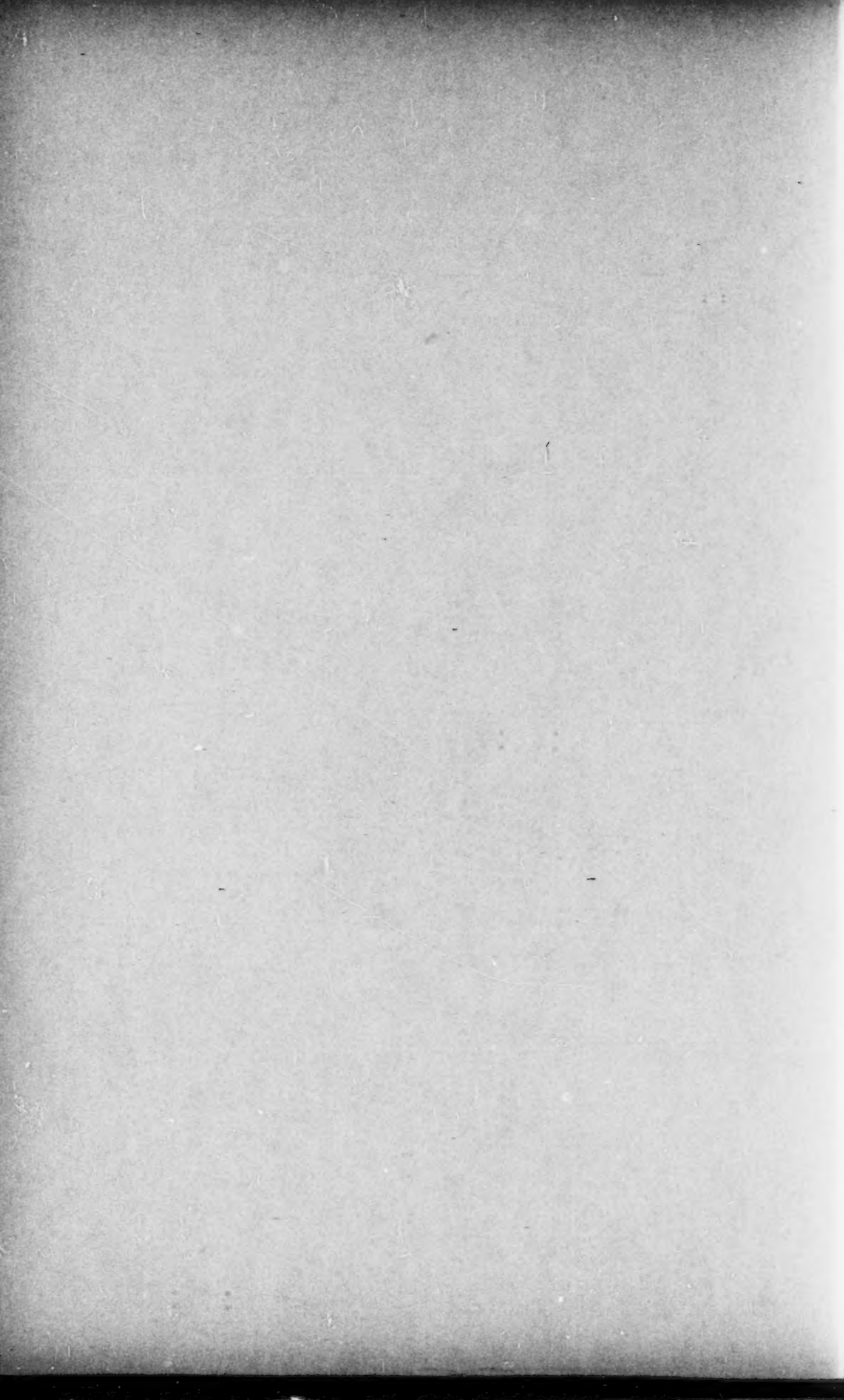
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BRIEF OF ROBINSON, ROBINSON & PHILLIPS, INC.  
IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

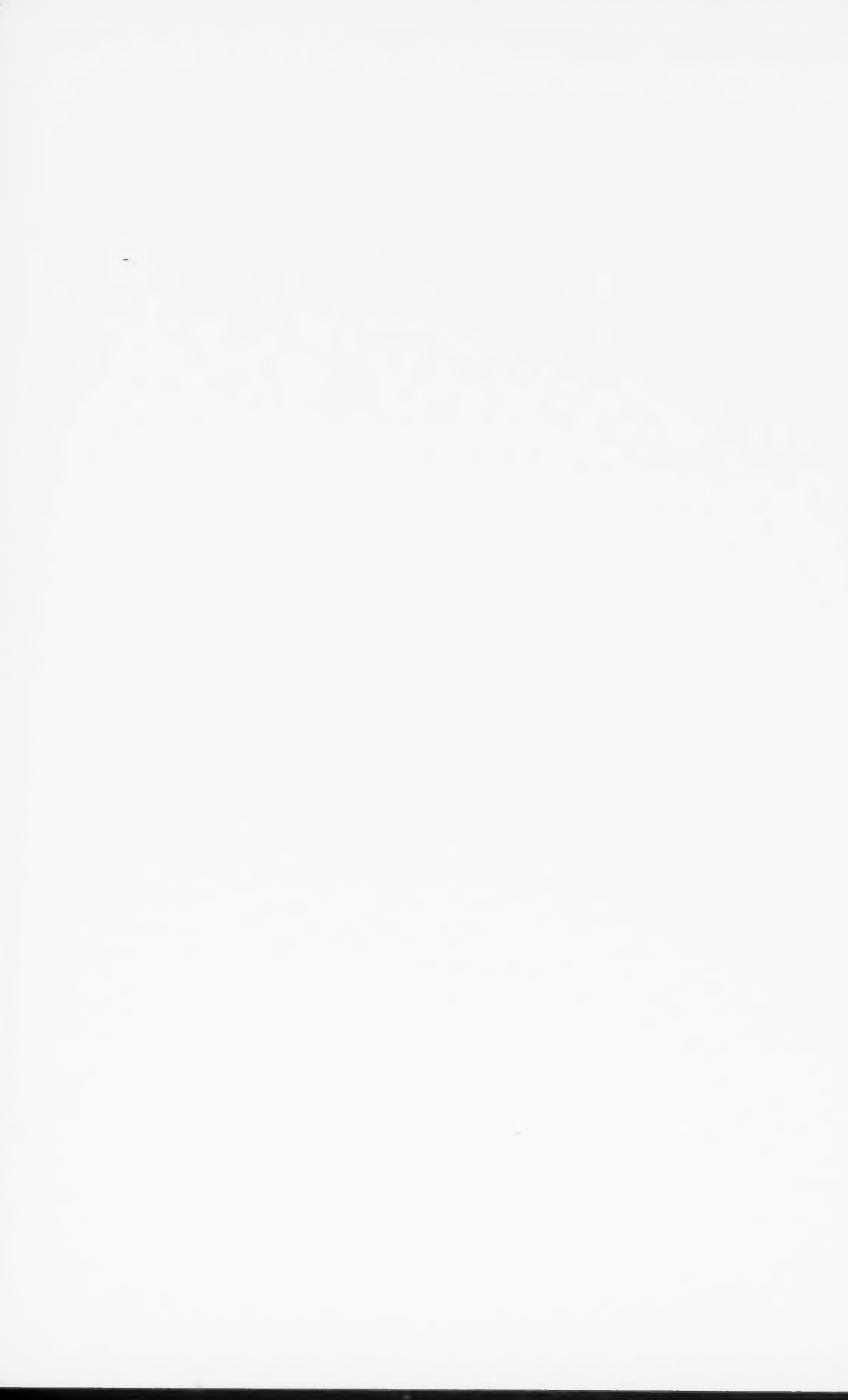
Whether a party in a divorce proceeding, who requests the court to make an award of the party's attorney's fees and litigation costs against the other party or out of the community property, and who instructs his attorney of record to make an application in support of the request for the award, has a Due Process right to have another attorney contest the application which the party's attorney of record makes on behalf of the party.



## TABLE OF CONTENTS

### Page

QUESTION PRESENTED . . . . .	ii
TABLE OF AUTHORITIES . . . . .	iv
1. Statement of the Case . . . . .	2
2. Summary of California Law . . . . .	3
3. Statement of Facts . . . . .	7
4. Argument . . . . .	13
5. Conclusion . . . . .	15



## TABLE OF AUTHORITIES

### Page

#### Cases

Marshank v. Superior Court,  
246 Cal.App.2d 541,  
54 Cal.Rptr. 782 (1966) . . . . . 4

Wong v. Superior Court,  
180 Cal.App.2d 602,  
4 Cal.Rptr. 593 (1960) . . . . . 4

#### Statutes

##### California Civil Code

Section 4370 . . . . . 5, 6  
Section 4370.5 . . . . . 5, 6  
Section 4370.6 . . . . . 5, 6  
Section 4371 . . . . . 7





IN THE  
SUPREME COURT OF THE UNITED STATES  
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STANLEY DILLER,  
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SELVIN & WEINER and  
ROBINSON, ROBINSON & PHILLIPS, INC.  
and  
DOROTHY DILLER,  
Respondents.

---

Petition for Writ of Certiorari  
to the Second Appellate District  
Court of Appeal of the  
State of California

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BRIEF OF ROBINSON, ROBINSON &  
PHILLIPS, INC. IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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Respondent Robinson, Robinson & Phillips,  
Inc. respectfully requests this Court to  
deny the petition of Stanley Diller for a  
writ of certiorari to the Second Appellate

District Court of Appeal of the State of California.

1. Statement of the Case

This case does not present a due process question. The petitioner tries to make it appear that it does by characterizing it as a case where the court awarded fees to the attorneys against their own clients. Nothing could be further from the truth. The case that was tried, insofar as attorneys' fees are concerned, was a claim by the wife that her fees should be awarded against the husband or out of the community property, and a claim by the husband that his fees should be awarded against the wife or out of the community property. The court granted the relief requested by both parties

by awarding the fees of both from the community property. The only unusual thing about this case is that the parties were uncommonly wealthy and extremely litigious. In principle it is in fact a garden variety divorce case in which every contention of either party was fully and fairly tried by a highly experienced and competent judge.

## 2. Summary of California Law

California courts do not deny due process when they determine a claim for attorney's fees between an attorney and his own client. Whenever that kind of a claim is made, the client, like any other defendant, is entitled to have counsel to cross-examine, present evidence, and argue in opposition to the plaintiff's claim.

Under California law a dispute between an attorney and his own client may not be tried in a divorce case or any other case when the attorney still represents the client.

California law does not allow the attorney for a party in a divorce case to sue his own client for fees or costs in the divorce case. The attorney must bring a separate action against his client if he contends that the client owes him fees or costs incurred in the divorce case. (Wong v. Superior Court, 246 Cal.App.2d 541, 54 Cal.Rptr. 782 (1966); Marshank v. Superior Court, 180 Cal.App.2d 602, 4 Cal.Rptr. 593 (1960).)

The jurisdiction of the court in a divorce case, in respect of attorney's fees

and costs, is limited to awarding the fees and costs of one party, at his or her request as a part of the prayer for relief, against the other party, or from the community property. The traditional basis for making an award of attorney's fees and costs in a divorce case is the financial need of the requesting party compared to the ability to pay of the other party. Since 1985, the courts have been, and now are, additionally authorized to award attorney's fees and costs as a sanction when the conduct of the party against whom the award is made, or his or her attorney, frustrates the policy of the law to promote settlement of litigation and to reduce the cost of litigation by encouraging cooperation between the parties and the attorneys. (California Civil Code sections 4370,

4370.5, 4370.6.)

A party who requests an award of attorney's fees and costs in a divorce case or any other case is not entitled to have another attorney contest his application for the award. No party has any right to contest his own prayer for relief in any manner. A party may make any claim he wishes, and may withdraw or modify his claim before the court adjudicates it. But no one is entitled to oppose his own claim. If the party does not want his attorney to apply for the award or does not want to apply for all of the fees and costs his attorney claims, the party may instruct his attorney either not to apply for the award or to limit the application to the amount the party wants to claim. The attorney must

then sue the client in a separate action for any fees or costs he claims the client owes, and the client is then entitled to have another attorney contest the claim.

When an award of attorney's fees and costs is made, it may be made payable directly to the attorney for the party who requested the award. (California Civil Code section 4371.) If the award is made payable to the attorney, the attorney is entitled to enforce it, and his client is relieved of the obligation to pay his attorney's fees and costs to the extent they are paid by the other party pursuant to the award.

### 3. Statement of Facts

Mark Robinson of Robinson, Robinson & Phillips was the attorney for the husband,

Stanley Diller, in the trial of the Diller divorce case. He obtained for the husband an award of all of his unpaid attorney's fees and costs from the community property. Much of the time in divorce proceedings the husband is required to pay his fees as well as his wife's from his separate assets rather than, as here, where his wife is paying one half of his fees as well as of her own out of the community.

The husband had two attorneys, Ronald Anteau and Mark Robinson. Anteau was his first attorney. Robinson was substituted to try the case. The husband wanted Anteau to act as co-counsel with Robinson, but Anteau's law firm would not agree to that. Although Anteau was not an attorney of



record in the trial, the husband continued to utilize his services as "independent" counsel from time to time. Robinson and Anteau were not antagonistic to each other. They at all times attempted to minimize whatever inconsistencies in the positions they were sometimes required to take by the husband.

The husband's contention that he disputed the amount of his own attorneys' fees and was denied the opportunity to cross-examine or present evidence on that issue is not apparent from a reading of the record. The record shows the husband's contention throughout the trial was that his attorney should claim all of his fees and attempt to have them awarded against the wife or out of the community property. Ronald Anteau, his

"independent" counsel, took the same position. He supported the husband's trial attorney on his fee claim. There is no inference available from the evidence that the husband or his "independent" counsel would have sought to minimize the husband's attorney fee claim if given the opportunity to do so. That would have undermined the husband's basic position in the lawsuit that the enormous component of time used by his attorney was a direct result of the wife's unconsonably vexatious positions throughout the proceedings.

There was no conflict of interest between Robinson and the husband. Robinson did ask to withdraw at the beginning of the trial in September 1987, but that was because the husband was not paying his fees, not because

of any conflict of interest. The husband had paid a retainer when he hired Robinson and had agreed to pay his fees and costs as incurred on an hourly basis. But he was unable to continue paying at that time because he had so many other obligations that were draining his liquid assets. The judge did not allow Robinson to withdraw, and this situation continued throughout the trial. There was never an argument over the amount of Robinson's bills. Whenever Robinson asked for partial payment the husband would tell him that he would like to pay but did not have the money to do so. He never claimed that he did not owe the fees and costs which continued to mount.

Toward the end of the trial, in December 1987, the husband re-employed Anteau to

negotiate a settlement with the wife and her "independent" counsel. Robinson was not included in the settlement negotiations or in the attempt to uphold the agreement. His instructions were to continue with the trial. A settlement agreement was signed and presented to the court, but within a few days the wife instructed her trial attorney to move to rescind it. Anteau represented the husband at the hearing of the motion and presented evidence in opposition. When the motion to rescind was granted, Anteau specifically advised the court that Robinson's authority to press the husband's attorney fee claim had not been withdrawn by the settlement agreement. Anteau was one of Robinson's principal witnesses on the husband's attorney fee claim. The husband claimed that all of his attorney's fees and

costs should be assessed to the wife or the community property as a sanction because of her conduct in prolonging the litigation. Anteau testified on this issue during the settlement negotiations, at the conclusion of the trial after the agreement was rescinded, and at the hearing in January 1988 when the court allegedly denied due process.

#### 4. Argument

The due process claim hinges entirely on the fact that the judge told Anteau and the wife's independent counsel during the trial that they would be allowed to participate at the hearing in January, and then advised them at the hearing that they would not be allowed to participate. The reason was that

it was initially contemplated that the purpose of the January hearing would be to determine the amounts of the attorney fee claims, but the judge later decided that the documentation of the fee claims, together with his own observations (the judge himself was a witness to the work performed by the attorneys), was sufficient to determine that issue.

The husband does not claim there was a denial of due process because the quality of the evidence was insufficient.

His contention is that he was denied due process because Anteau was not allowed to cross-examine. The problem with this argument is that even if Anteau had cross-examined, he would not have cross-examined Robinson. Robinson and Anteau were

asserting the husband's claim for fees. All Anteau could have done would have been to assist Robinson in cross-examining the wife's attorney on the wife's claim for fees.

## 5. Conclusion

The petition for a writ of certiorari should be denied for two reasons:

One. If, as the petitioner contends, there are States that permit judges in matrimonial actions to award attorneys' fees to lawyers without giving the party who must pay the fees an opportunity to be represented and defend, California is not one of them. In California fees may only be awarded to one party against the other, and

the party who must pay is entitled to be represented and defend against the attorney fee claim. In California no lawyer is allowed to sue his own client in a divorce case or any other case in which he still represents the client.

Two. The facts of this case do not support the petitioner's due process argument. Robinson never claimed fees from his own client in the divorce case. The attorney fee claim he made was the husband's claim for an award of fees against the wife or out of the community property. The husband's independent counsel would not have cross-examined Robinson even if he had been allowed to do so because it would have been counter-productive to the husband's position that his attorney had been required to spend



exceptional quantities of time responding to wife's incessant and litigious tactics.

Now, husband and wife have curiously joined forces to contest the court's decision in so far as it affects each of them. However, obtaining "due process" is not their real motivation.

Date: November 13, 1991

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## APPENDIX A



## APPENDIX A

§ 4370.. Costs and attorney fees pendente lite; attorneys fees for enforcement of support order

(a) During the pendency of any proceeding under this part, the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorney's fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded. In respect to services rendered or costs incurred after the entry of judgment, the court may award

such costs and attorneys' fees as may be reasonably necessary to maintain or defend any subsequent proceeding, and may augment or modify any award so made, including after any appeal has been concluded. Attorneys' fees and costs within the provisions of this subdivision may be awarded for legal services rendered or costs incurred prior, as well as subsequent, to the commencement of the proceeding. Any order for a party who is not the husband or wife of another party to the proceedings to pay attorneys' fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party.

(b) during the pendency of any proceeding under this part, an application for a temporary order making, augmenting, or modifying an award of attorneys' fees or

costs or both shall be made by motion on notice or by an order to show cause, except that it may be made without notice by an oral motion in open court in either of the following cases:

(1) At the time of the hearing of the cause on the merits.

(2) At any time prior to entry of judgment against a party whose default has been entered pursuant to Section 585 or 586 of the Code of Civil Procedure.

(c) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to pay, shall award reasonable attorneys' fees to a custodial parent in any action to enforce an existing order for child support.

(d) Notwithstanding any other provision of law, absent good cause to the contrary, the court, upon determining an ability to

pay, shall award reasonable attorneys' fees to a supported spouse in any action to enforce an existing order for spousal support. (Added by Stats. 1970), c. 311, §1. Amended by Stats. 1979, c. 1030, §2; Stats. 1981, c. 715, §1; Stats. 1984, c. 359, §1.)



APPENDIX B



## APPENDIX B

§ 4370.5. Justness and reasonableness of award by court; considerations; order of payment

(a) The court may make an award of attorneys' fees and costs under this chapter where the making of the award, and the amount of the award, is just and reasonable under the relative circumstances of the respective parties.

(b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case, taking into consideration to the extent relevant the circumstances of the respective parties described in

subdivision (a) of Section 4801. The fact that the party requesting an award of attorneys' fees and costs has the resources from which he or she could pay his or her own attorneys' fees and costs is not itself a bar to an order that the other party pay part, or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances.

(c) The court may order payment of an award from any type of property, whether community or separate, principal or income. (Added by Stats. 1985, c. 362, §1. Amended by Stats. 1989, c. 1105, §3; Stats. 1990, c. 893 (A.B.2686), §1.)

## APPENDIX C



## APPENDIX C

\$4370.6. Alternative basis for award by court; encouraging cooperation; award as sanction; notice; property or income of sanctioned party

(a) Notwithstanding Sections 4370 and 4370.5, the court may base an award of attorneys' fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties incomes,

assets, and abilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden upon the party against whom the sanction is imposed. In order to obtain an award under this section the party requesting an award of attorneys' fees and costs is not required to demonstrate any financial need for the award.

(b) An award of fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award of fees and costs as a sanction pursuant to this section shall be payable only from the property or income of the party against whom the sanction is imposed, except that the award may be



against the sanctioned party's share of the  
community property. (Affid by Stats. 1990,  
c. 893 (A.B. 2686), §2)



## APPENDIX D



## APPENDIX D

§4371. Attorney fees and costs; direct payment; enforcement

When the court orders one of the parties to pay costs and attorneys' fees for the benefit of the other party, such costs and fees may, in the discretion of the court, be made payable in whole or in part to the attorney entitled thereto. An order of the court providing for payment of such costs and fees may be enforced directly by such attorney in his own name or by the party in whose behalf such order was made, provided that if such attorney has ceased to be such, it shall be a condition of such enforcement, and must appear of record, that such attorney shall have given to his former client or successor counsel 10 days' written notice of his application for such

enforcement, and during such period the client may file in such proceeding a motion directed to such former attorney for partial or total reallocation of fees and costs to cover the services and cost of successor counsel, in which event such proceeding shall be stayed until the court has resolved such motion. (Added by Stats. 1970, c. 311, §1.)

